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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 509

HARRY R. RANDALL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 555

BRISTOL HACKBUSCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the majority in the circuit court of appeals (No. 509, R. 347–355; No. 555, R. 171–179), one judge dissenting without opinion, has not yet been reported.

JURISDICTION

In No. 509, the judgment of the circuit court of appeals was entered November 3, 1947 (R. 346, 355), and a petition for rehearing was denied December 3, 1947 (R. 361). The petition for a writ of certiorari was filed January 2, 1948.

In No. 555, the judgment of the circuit court of appeals was entered November 3, 1947 (R. 179–180), and a petition for rehearing was denied on December 3, 1947 (R. 215). On December 29, the Chief Justice extended petitioner's time to file a petition for a writ of certiorari to February 1, 1948 (R. 216). The petition was filed on January 29, 1948.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

As to each petitioner:

1. Whether the evidence is sufficient to support the verdict.

2. Whether District Judge Lindley was disqualified from sitting as a member of the circuit court of appeals because he had previously sentenced the person named as a co-conspirator on his plea of guilty to an indictment charging substantive offenses.

Petitioner Hackbusch also raises the following question:

3. Whether the trial court coerced the jury when it sent them back for further deliberations.

STATUTES INVOLVED

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

R. S. 5209, as amended (12 U. S. C. 592), provides in pertinent part:

> Any officer, director, agent, or employee of any Federal reserve bank, or of any member bank as defined in the Act of December twenty-third, nineteen hundred and thirteen, known as the Federal Reserve Act, or of any national banking association, or of any insured bank as defined in subsection (*c*) of section 12B of the Federal Reserve Act, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of such Federal reserve bank or member bank, or such national banking association or insured bank * * * or who makes any false entry in any book, report, or statement of such Federal reserve bank or member bank, or such national banking association, or insured bank, with

> intent in any case to injure or defraud such Federal reserve bank or member bank, or such national banking association or insured bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such Federal reserve bank or member bank, or such national banking association or insured bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such Federal reserve bank or member bank, or such national banking association or insured bank, or the Board of Governors of the Federal Reserve System; * * * shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court of the United States shall be fined not more than $5,000 or shall be imprisoned for not more than five years, or both, in the discretion of the court.

Section 120 of the Judicial Code (28 U. S. C. 216) provides in pertinent part:

> * * * In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular assignments shall be designated by the court. No judge before whom a cause or question may have been tried or heard in a district court, or exist-

ing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals.

STATEMENT

Petitioners were separately indicted and separately tried for conspiring with one Sterling J. Perry to violate the Banking Act by having Perry, an officer of the National City Bank of Evansville, Indiana, a national and federally insured bank, misapply funds of the bank, and cause false entries to be made in the books and reports of the bank with intent to defraud the bank and deceive its officers, the Comptroller of the Currency, and bank examiners (No. 509, R. 2–12; No. 555, R. 2–12). Each was convicted (No. 509, R. 325; No. 555, R. 147), and each was sentenced to imprisonment for two years and to pay a fine of $5,000 (No. 509, R. 333–334; No. 555, R. 154). On appeal, the judgments against petitioners were affirmed (No. 509, R. 355; No. 555, R. 179–180).

Although the cases were separately tried, the schemes proved and the contentions of petitioners were so similar that the circuit court of appeals treated the appeals in both cases in one opinion, and for the same reasons, we treat the cases together in this brief. Each case involves the relationship of the petitioner with Sterling J. Perry, an officer of the National City Bank of Evansville, who, at the times in question here, held the position of cashier and vice-president.

In each case, it was established without dispute that in May 1946, Perry admitted that he had embezzled and misapplied $142,000 of the bank's funds. (No. 509, R. 33, 37-38, 41, 124–125; No. 555, R. 26–28, 85, 101.) It is not disputed that petitioners received substantial sums from Perry, as set forth below. The question at issue in each case was whether the petitioner knew that the money so received was the bank's money obtained by Perry through misapplication of the bank's funds.

The Government's evidence against Randall (No. 509) may be summarized as follows:

Perry met Randall in 1939, and in the years 1940 and 1941, loaned him, from personal funds, small sums of money which were repaid (R. 124, 125, 127). In 1943, Randall's demands on Perry became heavier (R. 127), and Perry began to cash Randall's personal checks with funds of the bank, taking money from the bank's cash drawer and making false entries in the bank records (R. 132–133). He would keep the checks in a drawer and eventually deliver a group of them to Randall (R. 132–133). Randall had a personal account in the bank only for the period from June 16, 1939, to July 2, 1941 (Gov. Ex. B–1, R. 60, 164).

In September 1943, Perry decided that this method of handling the transactions was too loose, and he opened an account in the name of S. Hackran (representing a combination of the names of Hackbusch and Randall) (R. 132, 134–

135; Gov. Ex. B–5, R. 61). However, only one check for a thousand dollars drawn by Randall was paid out of that account (R. 119–120, 167, 180). Perry apparently continued to cash Randall's personal checks by using money from the cash drawer (R. 168–169).

In February 1944, Perry opened an account in the name of Randall, which was known as the "Randall Red Special Account" to distinguish it from another special account carried by Randall (R. 131, 137–138; Gov. Ex. B–5, R. 61). Perry deposited in this account money misapplied from other funds of the bank (R. 144–145). Perry would debit the account with money which he paid for Randall's rent and living expenses, and would also clear through that account personal checks drawn by Randall (R. 137–141). Randall had a number of accounts in the bank at the time, but on none was payment authorized on his personal signature without special designation (R. 137–138, 145–146, 165–167; see R. 60–62). Perry would collect the checks and debit memoranda and deliver them in batches to Randall, totalling the amount on an adding machine tape (R. 133, 150, 161). Randall never received a bank statement accounting for his personal checks, although he did receive regular statements on his other accounts (R. 151, 161, 252, 284).

During the period from February 1944, when the special account was opened, until May 1946,

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when Perry confessed, a total of $16,335.98 was given to Randall (R. 180–181). Perry estimated that in all he had given Randall about $50,000 (R. 134).

Perry testified that he did not tell Randall of the accounts he had opened and did not tell him in so many words that he was using the bank's money to cover Randall's checks (R. 149, 150, 152, 161). He did say that he and Randall had discussed the situation, and that Randall knew the matter was urgent (R. 135).

Randall took the stand in his own behalf and testified that he thought Perry was lending him money on his own account (R. 245, 247). He admitted that when he issued checks with his personal signature, he did not expect the checks to be charged to any of his regular accounts in the bank (R. 273–274). He stated, "that was the account that I was borrowing money from Mr. Perry personally, and he was taking care of for me" (R. 273). He testified that he kept no check stubs for the checks issued on his personal signature, and relied on Perry's figures (R. 281–282).

At the end of December 1943, Randall had his accountant total the checks delivered to him by Perry, which amounted to about $8,900 and had the amount of $10,000 posted on his books as a debt to Perry (R. 210–211, 254). Randall testified that at that time he gave Perry a note for $10,000, and subsequently signed notes for the amounts received in later years (R. 253, 277,

279–280). Perry testified that he never received a note from Randall (R. 308–309).

In submitting the case to the jury, the judge instructed them that if they found that Randall in good faith believed that the money he received was loaned to him out of Perry's personal funds, and that Randall had no knowledge that Perry was cashing the checks with the bank's money, Randall could not be found guilty (R. 322). He also charged that if Randall had an understanding with Perry which would require Perry to misapply funds of the bank, Randall could be found guilty of conspiracy even though the jury did not find that he knew of the particular manner in which Perry handled the funds (R. 322–323).

The Government's evidence against Hackbusch (No. 555) may be summarized as follows:

Perry met Hackbusch about the middle of 1942, and occasionally made small loans to him (R. 86, 97). Hackbusch had an account in the bank in his name as trustee (R. 87; Gov. Ex. C–1, R. 49). Perry started cashing checks drawn by Hackbusch for which Hackbusch did not have sufficient funds on deposit, and used for that purpose money in the cash drawer of the bank. Perry would hold the checks, and when Hackbusch's account had sufficient funds, Perry would charge as many checks as possible back into Hackbusch's legitimate account (R. 91). In September 1943, Perry opened the S. Hackran account in which he

deposited money misapplied from the bank's funds (R. 89, 91). Through that account, he cleared checks, bearing Hackbusch's signature, for which Hackbusch did not have sufficient funds in his regular account (R. 92).

On January 22, 1944, Perry opened a special account in the name of Hackbusch, again using money misapplied from the funds of the bank (R. 93). At the time he opened that account, he had 13 checks drawn by Hackbusch totalling $700 (R. 93). Through that account, he cleared those and other checks drawn by Hackbusch (R. 93). According to the records of the bank, Hackbusch received, through Perry's cashing of his checks, $27,582.91 above the amounts deposited in his regular account (R. 121).

Hackbusch received statements on his legitimate trustee account but received no statements of the accounts set up by Perry (R. 97). Perry would accumulate the checks he cleared and deliver them in batches to Hackbusch, totalling the amounts of those delivered on adding machine tape (R. 98). Hackbusch never questioned Perry about the fact that the checks which he had drawn did not appear on his regular bank statements (R. 109).

In a credit statement made by Hackbusch on May 23, 1944, he failed to list any indebtedness either to Perry or the bank (Gov. Ex. 0–4, R. 81).

Perry estimated that he had given Hackbusch

between 40 and 50 thousand dollars of the bank's money (R. 96).

Hackbusch did not take the stand in his own behalf. His motion for a judgment of acquittal was denied by the trial judge (R. 148–151).

The judge's instructions to the jury as to the element of Hackbusch's knowledge of Perry's activities were similar to those given in the Randall case (R. 137–138; see, *supra*, p. 9).

ARGUMENT

1. Each of the petitioners contends that there was no proof that he knew that the money received from Perry came from misapplication of the bank's funds, and hence that the evidence was insufficient to support the verdict. In this connection, each of them argues that the circuit court of appeals applied an erroneous standard of appellate review in stating that its function was to determine whether the verdicts were supported by any substantial evidence. (No. 509, Pet. 3–9; No. 555, Pet. 17, 21, 54–63, 71–75.)

As we have shown, the question whether each petitioner knew that the money he was receiving from Perry had been obtained by misapplication of the bank's funds was submitted to the jury under instructions explicitly covering that issue. Each jury resolved that issue against each petitioner on, we submit, ample evidence.

It is undisputed that Randall and Hackbusch received at least $16,000 and $27,000, respectively,

over a period of years, by drawing checks on the National City Bank of Evansville, although they knew they did not have sufficient funds to cover those checks. They knew that their checks were not being cleared in regular fashion, since they never received regular statements for those checks. It is undisputed that they knew that Perry was covering the checks and that they expected him to do so. The jury had a right to conclude that petitioners knew that checks totalling large sums, which were continuously being cleared through the bank through the cooperation of Perry, the cashier of the bank, were cleared with the bank's money. The jury had a right to infer that businessmen know that they do not obtain personal loans from the cashier of a bank by drawing checks on the bank itself.

It was, of course, unimportant that Perry may not in so many words have told petitioners that he was using the bank's funds. Petitioners' practice of drawing checks on the bank for whatever expenses they had, regardless of whether or not they had funds in the bank, justified the inference that they had an understanding with Perry that he would see to it that their checks managed to clear the bank, and would use the bank's funds for that purpose. The evidence was therefore sufficient to support the conclusion that they conspired with Perry in misapplying the bank's funds. See *Ray* v. *United States,* 114 F. 2d 508 (C. C. A. 8), certiorari denied, 311 U. S. 709.

The judge properly instructed the jury that it was immaterial whether petitioners did or did not know the exact method by which Perry arranged to clear the checks. As this Court said in *Russell* v. *Post,* 138 U. S. 425, 431, a guilty person cannot "avoid his liability by proof that the exact nature and full details of the scheme were not communicated to him."

Petitioners' attack on the standard of appellate review applied by the court below is without merit. The standard set forth in the opinion below is the standard laid down in numerous decisions of this Court. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 254; *Glasser* v. *United States,* 315 U. S. 60, 80; *Gorin* v. *United States,* 312 U. S. 19, 32; *Pierce* v. *United States,* 252 U. S. 239, 251–252; *Stilson* v. *United States,* 250 U. S. 583, 588–589; *Abrams* v. *United States,* 250 U. S. 616, 619. The principle that an acquittal must be had if the circumstances are as consistent with innocence as with guilt is essentially a rule for the jury and not for the court. *Curley* v. *United States,* 160 F. 2d 229 (App. D. C.), certiorari denied, 331 U. S. 837. In any event, by any standard of the sufficiency of the evidence, the evidence here is sufficient.

2. Petitioners also contend that, under Section 120 of the Judicial Code, District Judge Lindley was not qualified to sit as a member of the circuit court of appeals because he had sentenced Perry on Perry's plea of guilty to an indictment charg-

ing substantive violations of the Banking Act (No. 555, Pet. 21–22, 24, 66–70; No. 509, Supplemental Petition). There is no merit in this contention. Judge Lindley did not act in the district court on any question concerning petitioners' guilt. Perry's defalcations were not disputed in either case and were not in issue on petitioners' appeals.

3. In the Hackbusch case, No. 555, the judge gave his instructions to the jury at 7:30 p. m. on January 14, 1947 (R. 124.) At 9:45 the next morning,[1] the foreman stated that the jury had been unable to arrive at a verdict (R. 139). The following discussion ensued (R. 139–141):

> The COURT. Is the jury being troubled by a question of fact or law?
>
> The FOREMAN. I think not. It has all been discussed for many hours.
>
> The COURT. Are there any questions of the law or any question of the instructions of the Court that you can not understand?
>
> The FOREMAN. I think there might have been a little doubt about the instructions, interpretation of conspiracy, possible a definition of it.
>
> The COURT. Well, I think I covered that so fully that I doubt if I could make it any more clear, if I would attempt to.
>
> I would assume from what you said it is largely a question of fact, isn't it?

[1] The United States Attorney stated in his brief in the court below that the jury did not deliberate all night but retired to their hotel rooms about midnight.

The FOREMAN. I don't quite know how to express it, but there is doubt in some of the minds on whether conspiracy was perpetrated.

The COURT. Well, it is a question of fact that the jury has to determine. That is exactly the question.

Now, I want to say this to you men: You took this case last night, when you were tired and when I was tired, and you went to work after dinner, when you were still tired, I know, and worked faithfully no doubt during the evening, trying to arrive at some conclusion.

This case must be determined some time by somebody, and it is the duty of the jury to determine the case, if it is possible at all. If there were three judges, the three judges would have to get together on a judgment. Twelve jurors have always determined criminal cases and civil cases by getting together on a consensus of opinion that all could endorse.

No man, of course, should give up any conscientious conviction on a question of fact, but it is the duty of each juror to discuss earnestly with the other jurors every question that is involved, and to strive to get together in agreement upon some solution that all of you can endorse. That is the way jury verdicts are arrived at, and it is very important that no man should make up his mind to just simply sit back and say, "This is the way I feel about it—take it or leave it."

You must discuss with one another. You must review the evidence over and over again, if necessary, go through it, consider it, and reach a unanimous conclusion, if possible.

I say, I don't ask you and don't suggest even, that you give up a conscientious scruple or conviction, but I do ask you to strive earnestly to reach a verdict, one that you can all say, "This is my verdict."

Now, I want you to go back to the jury room, and go through the evidence again, and if necessary a second time—go through it and keep working.

I sometimes work for days, trying to reach a solution of a case. I don't quit working. The jury must work, and you just can't guess a case off. You have got to work at it, review and review, try to get together. That is the purpose and the duty of the jury and if the juries will not get together, the courts are stale-mated, they can't make any progress.

Any suggestions by any of the counsel.

(No suggestions were offered by counsel.)

The COURT. Then you may return to the jury room. If you reach a point where you feel you must have some clarification of the law, I would suggest that you put it down in writing; then ask the bailiff to bring you back into the court, and I will try to clarify any point that may be bothering you, as a matter of law. I can't help you on the facts. That is something you have to take care of yourselves.

At about 11:00 a. m., the jury asked for further instructions on conspiracy and the judge repeated his instructions (R. 141–146). At 1:45 p. m., the jury returned its verdict of guilty.

There is no merit in petitioner's contention that the judge's remarks constituted coercion of the jury (Pet. 20–21, 24, 63–67). It is well established that a trial judge in his discretion may urge a jury which has reported disagreement to deliberate further in an endeavor to reach a verdict. *Allen* v. *United States,* 164 U. S. 492, 501–502; *Boehm* v. *United States,* 123 F. 2d 791, 812 (C. C. A. 8), certiorari denied, 315 U. S. 828; *United States* v. *Novick,* 124 F. 2d 107, 110 (C. C. A. 2), certiorari denied, 315 U. S. 813.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitions for writs of certiorari should be denied.

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